

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CHRISTOPHER MONROE PHELPS,

Defendant-Appellant.

UNPUBLISHED
December 5, 2006

No. 262367
Oakland Circuit Court
LC No. 2004-195917-FC

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of three counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b) (relation with victim under 16 years of age). He was sentenced to concurrent prison terms of 3 ½ to 15 years for each count. We affirm.

Defendant first argues that the trial court's ex-parte instruction to the jury while the jury was deliberating improperly prejudiced him because it coerced the jury into rendering a verdict. We disagree.

A claim of instructional error is reviewed de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). A claim that a verdict was coerced is reviewed on a case-by-case basis with all facts and circumstances, including particular language used by the trial court, to be considered. *People v Vettese*, 195 Mich App 235, 244; 489 NW2d 514 (1992).

Ex parte communication with a deliberating jury is discouraged. *People v France*, 436 Mich 138, 142; 461 NW2d 621 (1990). Consistent with MCR 6.414(B), a court must ensure that all communications pertaining to the case between the court and the jury or any juror are made part of the record.

Communication with a deliberating jury is classified as substantive, administrative, or housekeeping. *People v France*, *supra* at 142-143. Substantive communication includes supplemental instructions on the law and carries a presumption of prejudice to the aggrieved party. *Id.* at 143. Administrative communication includes instructions that encourage a jury to continue deliberating and carries no presumption. *Id.* When an administrative communication is

made and objected to, the burden of persuasion lies on the nonobjecting party to show that the communication did not prejudice¹ the objecting party. *Id.* Alternatively, a reviewing court may find the administrative communication prejudicial if the instruction violates CJI2d 3.12 (deadlocked jury instruction). See *id.* at 143-144.²

In the instant matter, after receiving a note from the jury stating, “[w]e have not made a unanimous decision. How should we proceed?[,]” the trial court instructed, “[w]e have days to continue[,] Keep deliberating[.]” Contrary to defendant’s assertion otherwise, this communication was plainly administrative as it encouraged the jury to continue deliberating. *France, supra* at 143. The instruction thus carries no presumption of prejudice. *Id.*

We further conclude that the instruction did not prejudice defendant. The trial court had previously advised the jury that deliberations could take five minutes to five days. Consistent with the trial court’s earlier statements, the instruction merely indicated that the jury would be given ample time to reach a verdict. Because the instruction was administrative in nature and simply encouraged continued deliberations, defendant’s argument concerning the failure to reinstruct the jury or give a deadlock instruction is without merit.

Defendant next argues that the trial court abused its discretion in not admitting the complainant’s mother’s prior testimony in a child neglect proceeding, because that testimony was admissible under MRE 804(b)(1). We disagree. A trial court’s decision regarding the admission of evidence is reviewed for an abuse of discretion, *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004), as is the decision of whether to grant a new trial, *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). An abuse of discretion exists when an unprejudiced person would not find a justification for the decision. *Geno, supra* at 632. “A trial court’s decision on a close evidentiary decision does not amount to an abuse of discretion.” *Id.*

Where a declarant is unavailable under MRE 804(a) as a witness, the hearsay rule does not exclude testimony by the declarant in the same or a different proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony under MRE 804(b)(1). *People v Adams*, 233 Mich App 652, 656-657; 592 NW2d 794 (1999). Whether a party had a similar motive to develop the testimony depends on the similarity of the issues for which the testimony was presented at each proceeding. *People v Vera*, 153 Mich App 411, 415; 395 NW2d 339 (1986).

Here, it is undisputed that the complainant’s mother was unavailable as a witness under MRE 804(a)(4), as she passed away before trial. It is also undisputed that the complainant’s mother provided testimony in a child neglect proceeding concerning the complainant prior to her death, and that complainant’s allegations of sexual abuse by defendant were addressed during the proceedings. However, the “rules governing child protective proceedings in probate court are significantly different than the rules which apply to criminal trials.” *People v Gates*, 434 Mich

¹ Prejudice is defined as “any reasonable possibility of prejudice.” *France, supra* at 142.

² The *France* Court referred to previously adopted jury instructions, 3 ABA Standards for Criminal Justice (2d ed), Standard 15-4.4(b). *France, supra* at 144 n 5.

146, 157; 452 NW2d 627 (1990). Moreover, the purpose of a neglect proceeding is the protection of children. *Id.* at 161. In contrast, a criminal proceeding involves whether the accused is guilty, and while a child's interests may be affected, they are not taken into account in determining whether the accused is guilty. *Id.* at 162.

While the prosecution had an opportunity to question the mother at the neglect proceedings, it did not have a similar motive to question her about the complainant's allegations of criminal sexual conduct. The prosecutor already had a signed confession from defendant. The prosecutor's motive in questioning the complainant's mother, then, was to establish not necessarily that the abuse had actually occurred, but that the mother was aware of the allegations and did nothing about them. The neglect proceedings entirely concerned the best interests of the complainant. The focus in the criminal trial, on the other hand, was on defendant's guilt or innocence. The prosecutor's motivation in questioning the mother in the prior neglect proceedings as to why she did not believe the complainant's allegations was thus not substantially similar to the issue of defendant's guilt in the criminal trial. Given the nature of the distinct issues involved in each trial, the trial court did not abuse its discretion in failing to admit the prior testimony.³

Defendant next argues that the trial court improperly refused to give jury instruction CJI2d 7.8, regarding identification of the assaulter, because the complainant had testified during trial that her former boyfriend had performed the same sexual acts on her as defendant had. We disagree.

We review claims of instructional error de novo. *People v Kurr, supra*. A decision of whether a jury instruction applies to the facts of the case is reviewed for an abuse of discretion. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories that are supported by the evidence. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). However, a court is not required to give a requested instruction on a theory of defense if there is no evidence supporting it. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995).

Here, the trial court did not abuse its discretion in refusing to give the requested instruction because the testimony clearly identified defendant as the assaulter. As indicated by defendant, the complainant did testify that she engaged in sexual acts with her boyfriend. However, the complainant was highly familiar with defendant, he being her stepfather, and she testified as to specific assaults that he made upon her over a period of time. There was nothing in the record indicating any confusion as to who committed the claimed assaults on the complainant. The use note to CJI2d 7.8 states that it is to be given whenever identity is at issue. In this case, however, defendant has not demonstrated that his identity was at issue. Thus, defendant's argument that CJI2d 7.8 should have been given is misplaced.

³ Because we conclude that the trial court did not abuse its discretion in excluding the prior testimony, the court did not abuse its discretion in refusing to grant a new trial for the alleged error.

Defendant finally argues that he was denied his due process right to a fair trial because of the cumulative effect of the prior alleged errors. We disagree. Issues of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Reversal may be necessary when the cumulative effect of several errors sufficiently prejudices the defendant. *Id.* at 591. However, only *actual* errors are to be considered to determine their cumulative effect. *Id.* at 592 n 12 (emphasis added). Because, as discussed above, none of the claimed errors are meritorious (or prejudicial), defendant's claim fails.

Affirmed.

/s/ Deborah A. Servitto

/s/ Michael J. Talbot